



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

LARGE BUSINESS AND
INTERNATIONAL DIVISION

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Legend

Taxpayer =

Parent =

Sub 1 =

Sub 2 =

Accounting Firm 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear

This letter responds to a letter dated Date 1, submitted on behalf of Taxpayer, requesting the Commissioner make a determination regarding the failure of one of its wholly owned subsidiaries, Sub 1, to join in the filing of a consolidated U.S. income tax return, as required by Section 1.1502-75(a)(1) of the Regulations, for the tax year ended Date 2.

Representations

- On Date 4, Parent purchased 100% of the outstanding stock of Sub 1.
- On Date 3, Parent organized a wholly owned subsidiary, Sub 2, as a limited liability company and timely filed Form 8832 in which Sub 2 elected to be taxed as a corporation for U.S. federal income tax purposes, effective as of its formation.
- For the tax year ended Date 2, Parent and Sub 1 filed separate returns.
- For the tax year ended Date 2, Parent and one of its subsidiaries, Sub 2 elected to file a consolidated return.
- For the tax year ended Date 2, Sub 1 filed a separate Form 1120, on which it reported no income and no deductions.
- The Date 2 consolidated return for Taxpayer included Form 1122 Authorization and Consent of Subsidiary Corporation To Be Included in a Consolidated Income Tax Return for Sub 2.
- The Date 2 consolidated return for Taxpayer included Form 851 Affiliations Schedule, on which Sub 2 was the only reported affiliated group member.

Law

IRC § 1501 provides that "An affiliated group of corporations shall...have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent."

IRC § 1504(a)(1) and (2) define the term "affiliated group" as "1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if—

- (i) The common parent directly owns stock with at least 80% of the total voting power and 80% of the total value of at least 1 other includible corporations, and
- (ii) Stock with at least 80% of the total voting power and 80% of the total value of each of the includible corporations is directly owned by 1 or more of the other includible corporations."

Treas. Reg. § 1.1502-75(a)(1) provides that "A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation that has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in paragraph (b) of this section) to the regulations under section 1502."

Treas. Reg. § 1.1502-75(b)(1) provides that "The consent of a corporation shall be made by the corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of a consolidated return if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section."

Treas. Reg. § 1.1502-75(b)(2) provides that "If a member of the group fails to file Form 1122, the Commissioner may under the facts and circumstances determine that such member has joined in the making of a consolidated return by such group. The following circumstances, among others, will be taken into account in making this determination: (i) Whether or not the income and deductions of the member were included in the consolidated return; (ii) Whether or not a separate return was filed by the member for that taxable year; and (iii) Whether or not the member was included in the affiliations schedule, Form 851. If the Commissioner determines that the member has joined in the making of the consolidated return, such member shall be treated as if it had filed a Form 1122 for such year for purposes of paragraph (h)(2) of this section."

Treas. Reg. § 1.1502-75(b)(3) provides that "If any member has failed to join in the making of a consolidated return under either subparagraph (1) or (2) of this paragraph, then the tax liability of each member of the group shall be determined on the basis of separate returns unless the common parent corporation establishes to the satisfaction of the Commissioner that the failure of such member to join in the making of the consolidated return was due to a mistake of law or fact, or to inadvertence. In such case, such member shall be treated as if it had filed a Form 1122 for such year for purposes of paragraph (h)(2) of this section, and thus joined in the making of the consolidated return for such year."

Treas. Reg. § 1.1502-75(h)(2) provides that "If a group wishes to file a consolidated return for a taxable year, then a Form 1122 ("Authorization and Consent of Subsidiary Corporation To Be Included in a Consolidated Income Tax Return") must be executed by each subsidiary... For taxable years beginning after December 31, 2002, the group must attach either executed Forms 1122 or unsigned copies of the completed Forms 1122 to the consolidated return. ... Form 1122 is not required for a taxable year if a consolidated return was filed (or was required to be filed) by the group for the immediately preceding taxable year."

Rev. Proc. 2014-24 allows an affiliated group that satisfies certain requirements to obtain an automatic determination to treat a subsidiary member of the affiliated group as if it filed a Form 1122, even though it failed to do so.

In this case, the Parent affiliated group does not satisfy the requirements of Revenue Procedure 2014-24 necessary to obtain automatic relief to treat Sub 1 as if it filed Form 1122 for the tax year ended Date 2. However, the IRS may act on behalf of the Commissioner to treat Sub 1 as if it had filed a Form 1122 and joined in the filing of the Parent consolidated return under the

provisions of Treas. Reg. § 1.1502-75(b)(2) or (3). Treas. Reg. § 1.1502-75(b)(2) does not apply in this case, because: 1) the income and deductions of Sub 1 were not included in the Parent consolidated return, 2) Sub 1 filed a separate return for Date 2, and 3) Sub 1 was not included in the Parent Form 851 affiliations schedule. In order to obtain relief under Treas. Reg. § 1.1502-75(b)(3), Sub 1's failure to join in the making of the consolidated return must have been due to a mistake of law or fact, or to inadvertence.

Determination

It is our position that Treas. Reg. § 1.1502-75(b)(3) applies in this case, and an amended return to include Sub 1 as a member of the Parent consolidated return should be allowed.

The fact that "The Date 2 consolidated return for Taxpayer included Form 1122 Authorization and Consent of Subsidiary Corporation To Be Included in a Consolidated Income Tax Return for Sub 2, and the fact that "The Date 2 consolidated return for Taxpayer included Parent and Sub 2 in the Form 851 Affiliations Schedule" indicate that the Parent affiliated group intended to file a consolidated return for the year ended Date 2. Treas. Reg. § 1.1502-75(a)(1) allows the Parent affiliated group to file a consolidated return in lieu of separate returns for the Date 2 tax year, provided that each corporation which was a member of the Parent affiliated group at any time during Date 2 tax year joins in the filing of the Parent consolidated return. The Taxpayer states that "at the time of the preparation of the relevant Date 2 U.S. federal income tax returns Accounting Firm 1 [the return preparer] mistakenly believed that the inclusion of Sub 1 in the Consolidated Return was voluntary, not mandatory."

It is our opinion that the common Parent corporation has satisfactorily established that the failure of Sub 1 to join in the making of the consolidated return was due to a mistake of law. If Parent intended to exercise its privilege of filing a consolidated return, and Parent directly owned at least 80% of the total voting power and 80% of the total value of Sub 1, then Sub 1 was required to join in the filing of the consolidated return in order to obtain the benefits of consolidation and should be treated as if it filed Form 1122 for the Date 2 taxable year per Treas. Reg. § 1.1502-75(b)(3).

Based solely on the information submitted and the representations set forth above, we conclude that pursuant to Treas. Reg. § 1.1502-75(b)(3), the taxpayer may be allowed to amend their consolidated return for the tax year ended Date 2, in order to include Sub 1 as a member of the consolidated return as if Sub 1 had timely filed Form 1122, and therefore joined in the making of a consolidated return.

Caveats

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this letter or about the tax treatment of any condition existing at the time of, or effects resulting from, any transaction or item that is not specifically covered by the above determination.

The determination contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party.

Procedural Matters

This determination is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

This office will associate a copy of this determination letter with the taxpayer's federal income tax return for the Initial Year. A copy of this determination letter should be kept in the taxpayer's permanent records.

Sincerely,

Scott Ballint

Digitally signed by Scott Ballint
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